APPENDIX

THE STATE OF WYOMING
FIFTH JUDICIAL DISTRICT

August 19, 1981

Mr. James H. Sperry
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Mr. Ronald P. Jurovich
Attorney at Law
P.O. Box 550
Thermopolis, Wyoming 82443

Ms. Esther I. Estryn
Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice
Washington, D.C. 20530

Re: Jack Wolfe vs. George Kinsel
Civil No. 7146, Hot Springs County, Wyo.

Dear Counsel:

The Defendant contends that even if the Defendant said what Plaintiff alleges the Defendant to have said (i.e. to the effect "that the Plaintiff was stealing oil") that said utterance was made under absolute immunity. Defendant argues that the absolute immunity existed because the phone call in which the slanderous remark was allegedly made was placed by the Defendant to a lease holder concerning oil on said lease and by reason of such the conversation fell within the perimeter of Defendant's employment. Defendant cites *Barr* v. *Matteo* and numerous federal cases contending the question of immunity is judged by federal standards.

I have no problem with *Barr* v. *Matteo* and the holding that absolute immunity attaches but I feel that the principle would only apply in the case of a government employee (i.e. Kinsel in the instant case) when such employee was making a report to a superior or to another employee. Granted, the purpose of the phone call by Kinsel to Herbaly concerned an oil problem which fell

within the scope of Defendant's employment, but the alleged slanderous statement concerning the Plaintiff made to Herbaly falls in my opinion beyond the ambit of his employment. The statement to Herbaly transcends not only the outer perimeter of Kinsel's duties but I fail to see that such a remark to a third person can be considered an appropriate exercise of discretion with full immunity afforded Kinsel.

If the remark was made by the Defendant then it was not an appropriate exercise of the discretion with which an employee of Kinsel's rank or even a person of executive rank is necessary clothed to make. I hold that there is no absolute privilege afforded Kinsel but only a qualified privilege. As stated by Justice Brennan in a dissent opinion in *Barr* v. *Matteo*, "It would protect the government officer unless it appeared on trial that his communication was (a) defamatory, (b) untrue, and (c) malicious."

Finding there are material issues of fact to be determined, I hold the matter should not be dismissed nor Summary Judgment granted.

Thus, the Defendant's Motion To Dismiss or in the alternative Defendant's Motion For Summary Judgment should be denied.

Mr. Sperry will prepare an order in conformance with the above and submit it to Ms. Estryn for her approval as to form and then to the Court for signature.

Very truly yours,

/s/ Harold Joffe
HAROLD JOFFE
District Judge

HJ:sg

IN THE DISTRICT COURT
OF HOT SPRINGS COUNTY, WYOMING
FIFTH JUDICIAL DISTRICT

Civil Action No. ———

JACK WOLFE,

Plaintiff,

-vs-

GEORGE KINSEL,

Defendant.

ORDER

THE ABOVE ENTITLED MATTER coming regularly before the Court on August 5, 1981, upon the Motion of Defendant entitled Motion To Dismiss Or In The Alternative For Summary Judgment, and the Court having heard and considered the evidence adduced in connection therewith and having heard and considered the presentations of counsel and being now fully advised, the Court finds that the Motion of Defendant to dismiss is based on the contention of Defendant that absolute immunity existed for Defendant and the Court finding that no absolute privilege should be afforded Defendant, but only a qualified privilege as indicated in the dissenting opinion in Barr -vs- Mateo by Mr. Justice Brennan and the Court further finding that there are material issues of fact to be determined precluding the granting of Summary Judgment to Defendant and that therefore the said Motion To Dismiss and the Motion For Summary Judgment should be denied;

IT IS, THEREFORE, ORDERED BY THE COURT THAT: Defendant's Motion To Dismiss Or In The Alternative For Summary Judgment should be, and it hereby is, denied. Defendant shall have the period of 30 days from the date of this Order in which to answer or otherwise plead herein.

DATED at Worland, Wyoming this 2 day of October, 1981.

/s/ Harold Joffe
District Judge

Approved as to Form But Otherwise Objected to:

/s/ Esther I. Estryn
MS. ESTHER I. ESTRYN
Attorney for Defendant

THE STATE OF WYOMING
FIFTH JUDICIAL DISTRICT

October 28, 1981

Ms. Esther I. Estryn
Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice
Washington, D.C. 20530

Re: Jack Wolfe vs. George Kinsel
Civil No. 7146, Hot Springs County, Wyo.

Dear Counsel:

I find nothing in the Defendant's Motion For Reconsideration which would make this Court reconsider its decision on the defense of absolute immunity and I hold that there is no need for oral argument on said issue.

It is your decision whether to appeal such ruling.

Very truly yours,

/s/ Harold Joffe
HAROLD JOFFE
District Judge

HJ:sg

cc: Mr. James H. Sperry
Mr. Ronald P. Jurovich

IN THE DISTRICT COURT
OF HOT SPRINGS COUNTY, WYOMING
FIFTH JUDICIAL DISTRICT

Civil Action No. 7146

JACK WOLFE,

Plaintiff,

vs.

GEORGE KINSEL,

Defendant.

ORDER

This matter having come before the Court initially on Defendant's Motion to Dismiss or in the alternative for Summary Judgment and Counsel having been heard on said Motion and subsequently on Defendant's Motion for Reconsideration, and the Court being fully advised in the premises, it is this 10th day of November, 1981, hereby

FINALLY ORDERED that Defendant's request for oral arguments on Defendant's Motion for Reconsideration is denied, and it is further

FINALLY ORDERED that Defendant's Motion to Dismiss or in the alternative for Summary Judgment based upon absolute immunity and Defendant's Motion for Reconsideration of the Courts Order dated October 2, 1981, be and hereby is denied.

/s/ Harold Joffe
HAROLD JOFFE
District Judge

IN AND FOR HOT SPRINGS COUNTY
RECORD OF FEES

Date 1981	Clerk's Fees—Papers Filed	Plaintiff Dr.	Plaintiff Cr.	Defendant Dr.	Defendant Cr.
Feb. 13	James H. Sperry		25.00	L.E.W.	
Feb. 13	Complaint				
Feb. 13	Summons Issued				
Mar. 19	Entry of Appearance				
April 2	Summons Returned				
April 3	Stipulation for Enlargement of Answer Time				
April 3	Order				
May 27	Notice of Motion [Defendant's Motion to Dismiss or in the Alternative for Summary Judgment]				
June 24	Subpoena—George Kinsel				
June 24	Subpoena—George Campbell				
June 24	Subpoena—George Havene				
June 24	Notice of Taking Deposition				
June 24	Notice of Taking Deposition				
June 24	Notice of Taking Deposition				
July 30	Subpoena—(George Campbell)				
July 28	Notice of Motion				
Aug. 4	Answers to Motion				
Aug. 5	Copy of letter to Mr. Justice for Janet Federiken				
Sept. 23	Notice of Setting				
Oct. 5	See Letter to Judge Joffe				
Oct. 5	Order				
Oct. 7	Notice of Motion [Defendant's Motion for Reconsideration]				
Nov. 10	Order				
Nov. 10	Notice of Appeal—Designation of Record				

IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1981

No. 5635

GEORGE KINSEL,

Appellant
(Defendant),

v.

JACK WOLFE,

Appellee
(Plaintiff).

ORDER DISMISSING APPEAL

It appears from the record that on October 5, 1981, the district judge entered an order denying appellant's motion to dismiss or in the alternative for summary judgment. The appellant then moved the district court for reconsideration, which was denied by the district judge by order entered on November 10, 1981, which also recited:

> "FINALLY ORDERED that Defendant's Motion to Dismiss or in the alternative for Summary Judgment based upon absolute immunity and Defendant's Motion for Reconsideraiton of the Court's Order dated October 2, 1981, be and hereby is, denied."

It is from this latter order that appellant has taken this appeal.

It is firmly established that this court will not entertain piecemeal appeals, Knudson v. Hilzer, Wyo., 551 P.2d 680 (1976); Snell v. Ruppert, Wyo., 541 P.2d 1042 (1975). A judgment or order which determines the merits of the controversy and leaves nothing for future consideration is final and appealable, and it is not appealable unless it

does those things, Public Service Commission v. Lower Valley Power and Light, Inc., Wyo., 608 P.2d 660 (1980); Arp v. State Highway Commission, Wyo., 567 P.2d 736 (1977).

The court finds that the order appealed from is not a final order within the purview of Rule 1.05, W.R.A.P.

Upon its own motion, the court

ORDERS that the captioned appeal be, and is, dismissed.

December 30, 1981.

By the Court

/s/ Robert R. Rose, Jr.
ROBERT R. ROSE, JR.
Chief Justice

IN THE SUPREME COURT
STATE OF WYOMING

OCTOBER TERM, A.D. 1981

No. 5635

GEORGE KINSEL,

Appellant
(Defendant),

v.

JACK WOLFE,

Appellee
(Plaintiff).

ORDER DENYING REINSTATEMENT

The court, having carefully considered the matter, concludes that it is not subject to any prevailing federal rule for interlocutory appeal asserted.

It is, therefore,

ORDERED that appellant's Petition for Reinstatement be, and is, denied.

January 26, 1982.

By the court

/s/ Robert R. Rose, Jr.
ROBERT R. ROSE, JR.
Chief Justice